

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENE JOHN RUTKOWSKI and DEPARTMENT OF TREASURY,
CUSTOMS SERVICE, Detroit, Mich.

*Docket No. 96-407; Submitted on the Record;
Issued June 19, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

The Board has duly reviewed the case record and finds that the case is not in posture for a decision.

On June 11, 1993 appellant, then a 39-year-old customs inspector, filed a claim alleging that he experienced "excessive job[-]related stress brought on by fellow inspector filing charges of alleged assault and notification by local law enforcement of my possible arrest, all while at work." The Office of Workers' Compensation Programs denied appellant's claim by decision dated August 25, 1993 on the grounds that he had not established fact of injury. By decision dated July 29, 1994, an Office hearing representative affirmed the Office's August 25, 1993 decision after finding that appellant had not alleged any compensable factors of employment. The Office further denied appellant's request for reconsideration by decision dated August 9, 1995, on the grounds that the evidence submitted in support of the request was insufficient to warrant modification of the prior decision.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹ On the other hand, the disability is not covered where it results from such factors as an

¹ 5 U.S.C. §§ 8101-8193.

employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.²

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.³ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁴

In the present case, appellant has alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered factors under the terms of the Act.

Appellant attributed his emotional condition to harassment by Ms. Carolyn Norman. For harassment to give rise to a compensable factor of employment under the Act, there must be evidence that harassment did, in fact, occur. Mere perceptions are not compensable. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁵ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁶

Appellant alleged that his coworker, Ms. Norman, harassed him by filing false criminal charges against him for assault. At the hearing, held on April 20, 1994, appellant related that about eight months prior to his May 21, 1993 arrest, Ms. Norman filed an Equal Employment Opportunity (EEO) complaint against him and two of his coworkers.⁷ Appellant stated that an EEO investigator recommended that Ms. Norman's complaint be dismissed, at which time her

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁴ *Id.*

⁵ *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁶ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁷ Appellant testified that he knew Ms. Norman since he began working for the federal government eight years prior and that their relationship was initially cordial. Appellant related that he worked an evening shift, and asked Ms. Norman to refrain from calling him at home during the day asking him to switch shifts. Appellant stated that the third time Ms. Norman called him at home he was rude to her and hung up the phone, and from that point on their relationship deteriorated.

hostility towards him increased. Appellant related that on May 21, 1993 he received a phone call from the police stating that they had warrants for his arrest on the charges of felony ethnic intimidation and misdemeanor assault and battery. Appellant stated that the warrants were based on Ms. Norman's allegation that on March 3, 1993 he bumped into her and made a racial slur while they were both at an employing establishment facility. Appellant denied the occurrence of any such event. Appellant related that he spent a day in jail; that the judge dismissed the felony charge, and that he was acquitted of the misdemeanor charge when the judge learned that Ms. Norman's alleged witness to the incident was not at work on the date in question.

Appellant's reaction to having criminal charges brought against him and being arrested on May 21, 1993 constitutes a compensable factor of employment. Ms. Norman brought charges against appellant that were later dismissed because her alleged witness was not present on the date of the supposed assault. The Board notes that any dispute between Ms. Norman and appellant does not appear to have been imported by the parties into the workplace from their private lives. Appellant testified that he knew Ms. Norman through his employment and that their relationship deteriorated after he requested her to stop calling him at home requesting that he switch workshifts with her. As appellant came into contact with Ms. Norman solely in the course of fulfilling his employment duties, the animosity between the parties arose during appellant's performance of his regular or specially assigned duties and while meeting the requirements of his employment.⁸ Therefore, appellant's reaction to a coworker bringing false criminal charges against him for an alleged incident which occurred at the employing establishment bears a sufficient relationship with his employment to afford coverage.

Appellant has also alleged verbal abuse by Ms. Norman.⁹ Appellant related that Ms. Norman shouted at him and threw things around the office. In support of his allegation appellant submitted statements by coworkers, two of whom stated that they observed Ms. Norman yell at appellant when he appeared to them to be only joking, and one of whom stated that he observed several instances of hostility directed by Ms. Norman towards appellant. However, none of the coworkers provided any details in their statements such as a description of the conversation or the surrounding circumstances, such that these alleged incidents may be established as factual. Furthermore, the Board notes that fact that the statements are dated in March 1995, almost two years after appellant filed his claim and subsequent to the August 25, 1993 and July 29, 1994 decisions denying appellant's claim diminishes the probative value of the statements. Thus, appellant has not submitted sufficient corroborating evidence to establish his allegations of verbal abuse by Ms. Norman.

Appellant further alleged that the employing establishment erred in failing to transfer him away from Ms. Norman. Appellant testified that prior to Ms. Norman swearing out an arrest

⁸ This is in contrast to the situation where the dispute is private and has its origin in appellant's domestic or private life and is imported into the work setting. Larson, in addressing the compensability of private quarrels imported from outside the employment, states: "When the animosity or dispute ... is imported into the employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test." Larson, *The Law of Workmen's Compensation*, section 11.21.

⁹ At the hearing, appellant characterized Ms. Norman as his supervisor. However, the employing establishment stated that Ms. Norman was not in a supervisory position.

warrant, he repeatedly requested that the employing establishment transfer him away from Ms. Norman. Although the assignment of work duties is generally related to employment, it is an administrative function of the employer and is not a duty of the employee. Denial of a job transfer is not compensable, absent evidence of error or abuse on behalf of the employing establishment.¹⁰ Appellant has not submitted any evidence to establish that the employing establishment's denial of his request for an assignment away from Ms. Norman was improper.

As appellant has established a compensable factor of employment under the Act, the Office must base its decision on an analysis of the medical evidence.¹¹ As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for that purpose.

The decision of the Office of Workers' Compensation Programs dated August 9, 1995 is hereby set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
June 19, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

¹⁰ *Michael Thomas Plante*, 44 ECAB 510 (1993).

¹¹ *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).